

EXHIBIT 87

Drummond Woodsum August
5, 2021 Presentation

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Another Brick in the Wall?

Thursday, August 5, 2021

9:00-11:00 AM | Live Online via Zoom

**Presented by Drummond
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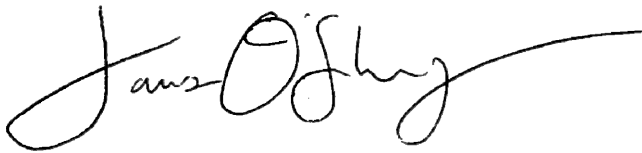
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CERTIFICATE OF ATTENDANCE

This is to certify that _____ has successfully completed 2 contact hours of continuing education at the program, **“Another Brick in the Wall?”** presented by Drummond Woodsum, held on Thursday, August 5, 2021.



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*This form denotes attendance at entire program.
If you arrive late or leave prior to the program ending time, it is your responsibility to adjust hours accordingly.*

Thank you for attending!

ZOOM LOGIN

Topic: **Another Brick in the Wall?**

Time: **Aug 5, 2021 09:00 AM** Eastern Time (US and Canada)

Join Zoom Meeting

<https://dwmlaw.zoom.us/j/82437490390?pwd=TGxqeG1PN2tRaDM1aW9xK0tFbE1yQT09>

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Another Brick in the Wall?

Thursday, August 5, 2021

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*The attorneys providing this training have made a reasonable effort to review the content of this training program and believe that it is in compliance with RSA 354-A.

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INTRODUCTION

- Topics Covered Today:
 - Prohibition on particular mandated employer trainings
 - Prohibition on teaching "prohibited concepts"
 - Jurisdiction and remedies
 - Protections for public employees
- NOT Covered
 - Critical Race Theory – CRT

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PROTECTED CLASSES: RSA 354-A

- Age
- Sex
- Gender identity
- Sexual orientation
- Race
- Color
- Marital status
- Familial status
- Disability
- Religion
- National origin

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NEW HAMPSHIRE'S DIVISIVE CONCEPTS BILL

- Originally considered in the Legislature as House Bill 544
 - The early versions of this bill had a much broader definition of "divisive concepts" – i.e. there were lots more concepts that were considered to be divisive that educators would have had to avoid.
 - HB 544 was NOT enacted into law.
 - However, certain amendments to the New Hampshire Human Rights Act (RSA 354-A) and RSA 193 (Pupils) were appended to the 2022 budget bill, also known as House Bill 2. These amendments include a prohibition on teaching certain divisive concepts. This bill DID pass and is now the law in all New Hampshire school districts.

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"DIVISIVE CONCEPTS" (1 OF 4)

- That people of one age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin, **are inherently superior or inferior** to people of another age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin
- ***Inherent***: existing in someone or something as a permanent and inseparable element, quality, or attribute (www.dictionary.com)

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"DIVISIVE CONCEPTS" (2 OF 4)

- That an individual, by virtue of his or her age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin **is inherently racist, sexist, or oppressive, whether consciously or unconsciously**

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"DIVISIVE CONCEPTS" (3 OF 4)

- That an individual **should be discriminated against or receive adverse treatment** solely or partly because of his or her age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin

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"DIVISIVE CONCEPTS" (4 OF 4)

- That people of one age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin **cannot and should not attempt to treat others equally and/or without regard to** age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion, or national origin.

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EQUITY VS. EQUALITY

- **Equity:** treating individuals based on their individual needs and requirements. Equity involves trying to understand and provide people with what they actually need to function on the same level as others.
- **Equality:** treating individuals equally and in the same manner, regardless of their individual needs or requirements. Equality aims to ensure that everyone receives the same opportunities and that individuals and groups are not treated differently or less favorably.

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PROHIBITION: PUBLIC EMPLOYERS

- No public employer, either directly or through the use of an outside contractor, shall teach, advocate, instruct, or train any employee, student, service recipient, contractor, staff member, inmate, or any other individual or group [any prohibited concept].
 - Note that K-12 students are covered under this provision, as are volunteers.

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PROHIBITION: TEACHING IN PUBLIC SCHOOLS

- **RSA 193:40**

- No pupil in any public school in this state shall be taught, instructed, inculcated or compelled to express belief in, or support for, any [prohibited concept].
- **Inculcate:** “to teach and impress by frequent repetitions or admonitions.... Implies persistent or repeated efforts to impress on the mind.”
– Merriam-Webster (<https://www.merriam-webster.com/dictionary/inculcate>).
- **Compel:** “to drive or urge forcefully or irresistibly.... to cause to do or occur by overwhelming pressure.”
– Merriam-Webster (<https://www.merriam-webster.com/dictionary/compel>).

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REMEDIES AND PENALTIES

- **People asserting that a school district has violated RSA 354-A (NH Law Against Discrimination) can bring claims in:**

- Superior Court:
RSA 354-A and other causes of action; Whistleblower Protection Act; RSA 98-E:3 (Public Employee Freedom of Expression)
- NH Commission for Human Rights: RSA 354-A
 - These remedies include compensatory damages, administrative fines, reinstatement, back-pay, unpaid wages, liquidated damages, attorney's fees, criminal penalties, equitable damages, injunctive relief, and declaratory judgment.

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PENALTIES FOR EDUCATORS

- **For violations of RSA 193:40** (i.e., teaching or training on “divisive concepts”):
 - “Any person” claiming to be aggrieved by this section (including the Attorney General) may:
 - File a civil action against a school **or** school district in Superior Court for legal or equitable relief
 - File a complaint with the NH Commission for Human Rights

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CODE OF CONDUCT VIOLATION

- **Educator Code of Conduct**
 - Violation of RSA 193:40 by an educator (including any professional employee whose position requires certification by the state board under RSA 189:39) is considered a violation of the educator code of conduct that justifies disciplinary sanction by the state board of education.
- Duty to Report – Ed 510.05
 - Every credential holder also has a duty to report any suspected violation of the code of conduct in accordance to local procedures (usually to their principal)
 - Every Principal shall report when the principal has been notified or is personally aware that a credential holder has violated the code of conduct (usually to the Superintendent).

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REPORT TO DEPARTMENT OF EDUCATION

- Duty to Report – Ed 510.05
 - Superintendent must report violations to the Office of Credentialing at the NH Department of Education when:
 - The superintendent has knowledge that a credential holder has violated the code of conduct
- If a credential has made a report and believes the local reporting procedures have not been followed, the reporting credential holder shall notify the department directly.

• **Note: at the time of the training, Ed 510 has not yet been amended to incorporate the new law.*

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PROTECTIONS FOR PUBLIC EMPLOYEES

- A public employee may refuse to participate in any training, program, or other activity at which the public employer “advocates, trains, teaches, instructs, or compels participants to express belief in or support for” a prohibited concept.
 - Such an action may fall under the Whistleblower Protection Act.
- The public employer may not take adverse action against the employee for this refusal.
- Per the NH Department of Education, the NH Commission for Human Rights, and the NH Department of Justice (“State Guidance”), the law does not prohibit employers from mandating attendance at training programs that comply with the law.
- Employees cannot refuse to attend or walk out simply because the training makes them uncomfortable.

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SCHOOL EMPLOYERS: PROHIBITED

- Retaliation or adverse action resulting from a good-faith refusal to participate in a program that violates the new provisions of RSA 354-A
- Programs stating that people:
 - Are inherently superior or inferior,
 - Are inherently racist, sexist, or oppressive (consciously or unconsciously),
 - Should be discriminated against or receive adverse treatment, or
 - Cannot or should not treat others equally and/or without regard to a protected characteristic

On the basis of a protected characteristic.

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SCHOOLS AS EMPLOYERS: PERMITTED

- Trainings in compliance with federal and state civil rights laws
 - Title IX
 - Title VII
 - The IDEA
 - The ADA/Section 504

Notwithstanding language in the statute, employers and public entities still have an obligation under federal law to provide accommodations and other differential treatment to individuals with disabilities.

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SCHOOLS AS EMPLOYERS: GRAY AREA

- Programs that involve discussion of power structures or power imbalances in society
 - Depending on how the topic is approached...
 - Safe harbor: discussion of concepts and ideas, rather than compelling a person to adopt a belief or even agree with the concept or idea.
 - Exposure to ideas and viewpoints, rather than asking or requiring acceptance or agreement with the ideas or viewpoints.
- Programs that involve advocating for these concepts will be more problematic:
 - Affirmative action to promote equity
 - Reparations for past wrongs
 - White privilege

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STATE GUIDANCE FOR SCHOOL EMPLOYERS

- According to State Guidance, employers may:
 - Take steps to examine issues related to “equity, diversity, inclusion, equality, and other related topics”
 - Conduct trainings “geared towards diversity, equity, equality and inclusion” including implicit bias training
 - Conduct trainings “that address racism, sexism, and other practices or ideas that have harmed or continue to harm certain identified groups,” even if it makes participants uncomfortable
- Practice Pointers:
 - 1) Review training materials in advance for compliance
 - 2) Notify employees that training conforms with RSA 354-A
 - 3) Add disclaimer to materials: “the Districts/School has reviewed the content of this training program and can confirm that it is in compliance with RSA 354-A.”

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SCHOOLS AS EDUCATORS: PROHIBITED

- Programs, including classroom instruction, stating that people:
 - Are inherently superior or inferior,
 - Are inherently racist, sexist, or oppressive (consciously or unconsciously),
 - Should be discriminated against or receive adverse treatment, or
 - Cannot or should not treat others equally and/or without regard to a protected characteristic

On the basis of a protected characteristic.

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SCHOOLS AS EDUCATORS: PERMITTED

- Discussing, as a part of a larger course of academic instruction, the historical existence of facts, topics, and subjects identified in the new law (including the prohibited concepts)
- Compliance with the ADA/Section 504 and the Individuals with Disabilities Education Act (IDEA), which require accommodation and other differential treatment for certain students with disabilities
- Teaching about the existence of racism, sexism, and other forms of discrimination

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CLASSROOM TEACHING: GRAY AREA

- Discussions regarding power structures in present-day society
 - These discussions could include debate about possible solutions to social problems, some of which may involve treating some groups differently than others.
 - Again, consider the difference between presenting ideas and concepts vs. compelling belief or agreement.
- Discussions of cultural sensitivity
 - Again, these discussions could involve recommendations about how to treat others in accordance with how *they* wish to be treated, which may not always be "without regard to" their protected characteristics.
- Caution:
 - Testing on controversial subjects
 - Requiring students to adopt belief in or to agree with certain ideas, viewpoints, concepts, or values.
 - Remember that students have first amendment rights in the classroom where the teacher opens up a discussion. Teachers can shut down students' comments only where they cause a "substantial disruption" to the school environment.

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SCHOOLS AS EDUCATORS: STATE GUIDANCE

- According to **guidance** from the NH Department of Education, NH Commission for Human Rights, and the NH Department of Justice, public schools may:
 - Continue to teach historical subjects such as: slavery, treatment of Native American populations, Jim Crow laws, segregation, treatment of women, treatment of LGBTQ+ people, treatment of people with disabilities, treatment of people based on their religion, or the Civil Rights Movement.
 - This may include discussion about the lingering impact of historical practices upon different identified groups.
 - Continue to have discussions related to current events, including the Black Lives Matter movement, efforts to promote equality and inclusion, or other contemporary events that impact certain identified groups
 - Present lessons, subjects, or areas of discussion that make students, faculty, or parents uncomfortable

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CLASSROOM TEACHING: BEST PRACTICES

- Train staff at the beginning of this school year on this new law
- Review lesson plans that related to controversial subjects
- Principals should work with teachers have specific concerns on how to adapt or modify their curriculum and lesson plans if necessary
- Review and prepare for pushback related to “divisive concepts”
- Consider the joint state guidance, as it provides insight into how the Department of Education interprets the law and how it will likely review allegations of teacher misconduct under this statute.

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FREE SPEECH: STUDENTS

- Free speech – students in the classroom:
 - Schools and the teachers in the classrooms have significant control over student expression in the classroom. Classrooms are not open forums for expression. Teachers can exercise control over student speech to assure that participants learn whatever lessons the activity is designed to teach.
 - Accordingly, teachers should continue to regulate classroom discussions to maintain control of the discussion and to ensure compliance with the law.

In general, remember that students maintain some free speech rights under the *Tinker* standard, which protects speech that does not create a substantial disruption to the school environment.

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ACADEMIC FREEDOM: TEACHERS

- Free speech – teachers in the classroom:
 - While teachers retain some limited free speech rights at work, courts have consistently held that primary and secondary school teachers really do not have academic freedom while engaged in teaching.
 - Teachers lack the same kind of freedom that professors enjoy to express their personal views and opinions.
 - Translation: teachers have the freedom in the classroom to discuss the assigned subject matter in the manner they deem appropriate, but must ensure that their comments are directly related to the curriculum established by the Board and do not delve into unlawful topics.
 - Collective bargaining agreements – some CBAs contain provisions titled, “Academic Freedom” which, for the most part, do not permit teachers to express their own views and opinions. However, if you have such a provision, teachers should be cautioned that state law now sets limits on what can be taught in the classroom.

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SCHOOL BOARD POLICIES

- Every school district in NH should have board policies which provide a process for:
 - Parents to object to objectionable course material
 - Parents and students to challenge the instructional materials and library resources used in the school's educational program on the basis of appropriateness.
- Familiarize yourself with these policies, ask your policy committee to review and update, and direct the public to follow the processes contained therein if they have complaints or issues:
 - IJL - Library and Instructional Materials
 - IGE/IGC - Objectionable Course Material

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OBJECTIONABLE CLASSROOM MATERIAL

- **RSA 186:11, IX-c (board policy IGC/IGE)**

- Requires school districts to adopt a policy allowing for an exception to objectionable course material.
- Parent notifies the school principal in writing of the specific material to which they object
- Principal and parents agree upon an alternative program, at the parent's expense, sufficient to enable the child to meet state requirements for education in the particular subject area.
- Instruction on human sexuality and sexual education – schools must also provide parents and legal guardians not less than 2 weeks advance notice of curriculum course material used for instruction of human sexuality or human sexual education.

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OBJECTION TO LIBRARY AND INSTRUCTIONAL MATERIALS

- American Library Association Positions:

- Freedom to Read Statement
- Library Bill of Rights – American Library Association believes that libraries are forums for information and ideas, and that the following basic policies should guide their services (partial list only):
 - I. Books and other library resources should be provided for the interest, information, and **enlightenment of all people of the community** the library serves. Materials should not be excluded because of the origin, background, or views of those contributing to their creation.
 - II. Libraries should provide materials and information presenting **all points of view on current and historical issues**. Materials should not be proscribed or removed because of partisan or doctrinal disapproval.
 - III. Libraries should **challenge censorship** in the fulfillment of their responsibility to provide information and enlightenment.

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STUDENT AND STAFF CODE OF CONDUCT

- School districts as both employers and educators should continue to follow and enforce their code of conduct.
- This law does not provide an opportunity for students or staff to engage in discriminatory conduct and such misconduct must continue to be addressed through appropriate methods.

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CLOSING THOUGHTS

- The state guidance, while helpful, does not fully resolve many of the concerns caused by the use of imprecise or vague language in the new law.
- The law is difficult to understand, often relying on double-negative sentence construction and undefined terms, which will have a chilling effect on otherwise lawful academic discussions.
- We know from recent US Supreme Court decisions that it is challenging for schools to regulate student conduct without infringing on student's First Amendment rights to free speech.
- One of the biggest compliance issues is how to appropriately monitor and control classroom discussions while lawfully regulating student speech.

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32

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